

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MICHAEL F. DAY,	:
Petitioner	:
v.	:
WARDEN GEORGE PATRICK, S.C.I.	:
HOUTZDALE,	:
Respondent	:

Case No. 3:07-cv-122-KRG-KAP

Report and Recommendation

Recommendation

Petitioner filed a motion to reconsider the denial of his petition for a writ of habeas corpus, docket no. 21. It should be denied.

Report

The petitioner's motion to reconsider attacks the effectiveness of his attorney in not calling two specific expert witnesses to testify as to the cause of death of Tequyla Pierce. The theories advanced by petitioner are similar to arguments made in his state court collateral attack on his conviction and in his habeas petition that trial counsel should have called a forensic pathologist generally or specifically should have called Doctor Williams; here petitioner claims that his trial counsel should have called the two doctors who conducted Price's autopsy or wrote the autopsy report. Those two doctors were not called as witnesses at trial. Petitioner argues that their testimony would have been so obviously favorable to his defense that Price's death was not a homicide that his trial counsel's failure to call them violated the Sixth Amendment.

Related to this claim, petitioner alleges that the Sixth Amendment's Confrontation Clause was violated when a third doctor, called by the prosecution, was permitted to comment on the autopsy reports in the course of giving her opinion on the cause of Price's death.

The petition was denied as untimely and as meritless. Petitioner's motion for reconsideration presents a new theory of ineffectiveness not developed in the state court and could not be heard in this court, even if it had been properly presented in state court, because the original petition was untimely. The motion to reconsider should be denied.

Pursuant to 28 U.S.C. § 636(b)(1), the parties are given notice that they have ten days to file written objections to this Report and Recommendation.

DATE: _____

June 19, 2009

KEITH A. PESTO

Keith A. Pesto,
United States Magistrate Judge

Notice by ECF to counsel of record and by U.S. Mail to:

Michael F. Day CX-7073
S.C.I. Houtzdale
P.O. Box 1000
Houtzdale, PA 16698-1000